Supreme Court, U.S.
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No. 86-95

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

RICHARD RUNYAN,

Petitioner,

vs.

NCR CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

1. Can rights under the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, be waived by a private, unsupervised release, knowingly and voluntarily executed, where there is a bona fide factual dispute over liability?

RULE 28.1 LISTING

NCR Corporation (Bahamas, Limited)

NCR Industrial de Mexico, S.A. de C.V.

SIGA—MEXICANA, S.A. DE C.V.

NCR Nederland N.V.

NCR Corporation (Phillippines)

NCR Bilgi Islem Sistemleri A.S.

Cajas Registradoras National, Azmitia Y Compania, Limitada

NCR Japan Ltd.

NCR Mediterranean Technical Education Centre Limited

NCR (Nigeria) Limited

NCR (Cyprus) Limited

NCR Ghana Limited

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RESPONDENT'S BRIEF IN OPPOSITION

OPINIONS BELOW

The citation of the decision of the United States Court of Appeals for the Sixth Circuit, *en banc*, is *Runyan v. National Cash Register Corp.*, 787 F.2d 1039 (6th Cir. 1986). The Trial Court's decision is *Runyan v. National*

Cash Register Corp., 573 F. Supp. 1454 (S.D. Ohio 1983). The earlier three-judge panel decision of the Sixth Circuit Court of Appeals is unofficially reported as *Runyan v. National Cash Register Corp.*, 37 Fair Employment Practice Cases 1086 (6th Cir. 1985).

FEDERAL STATUTES OR REGULATIONS INVOLVED

The statute involved in this case is the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*

COUNTERSTATEMENT OF THE CASE

A statement of the case by Respondent is necessary because the statement appearing at pages 3-6 of the Petition for a Writ of Certiorari ("Petition") omits important facts.

In 1972 Richard Runyan ("Runyan"), at age 53, was hired by the Vice President and General Counsel at NCR Corporation ("NCR"), James E. Rambo, to work as an Assistant General Counsel in NCR's Corporate Legal Department. He came to NCR with approximately 30 years of legal experience, more than 20 of which was spent in the field of labor law.

In early 1977, Rambo told Runyan that his employment with NCR would be terminated at the end of three months because of unsatisfactory performance. At this meeting, Runyan informed Rambo that he felt his "termination was related to age discrimination." During his tenure at NCR, Runyan had been involved in age discrimination issues and cases, as well as other fair employment and labor matters.

Additional meetings occurred between Runyan and Rambo where the terms of Runyan's termination from NCR were discussed. As a result of these discussions, Runyan entered into a written Consulting Agreement with NCR effective June 1, 1977, through May 31, 1978. He was to be compensated at a per diem rate for the days he worked, subject to a minimum compensation of $2,333 per month plus reimbursement for work-related expenses.

In November of 1977, Runyan requested that the length of his Consulting Agreement be extended and that he be given increased compensation pursuant to the Agreement. At a subsequent meeting, Rambo informed Runyan that although the term of his Agreement would not be extended, his compensation would be increased to $4,000 per month effective November 1, 1977, if he executed a release of all claims he had or may have against NCR relating to his employment and/or his termination from such employment.

In accordance with their understanding, on November 25, 1977, Rambo and Runyan entered into a written amendment to the earlier Consulting Agreement which provided that Runyan would receive $4,000 per month from November 1, 1977, to May 31, 1978. On that same day Runyan signed an "Accord and Satisfaction, Release, and Discharge."[1]

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[1] The text of the Release reads as follows: "In consideration of the 'Amendment to the Consulting Agreement' executed by NCR on November 25, 1977, receipt of which is hereby acknowledged and which I acknowledge to be in full accord and satisfaction of any and all claims I may have against NCR arising out of the course of my employment and/or the termination of my employment and in further consideration of the said 'Amendment to Consulting Agreement,' I, Richard V. Runyan, hereby release and forever discharge NCR, its successors, assigns, transferees, officers, employees, representatives and agents from all manner of action and

On May 31, 1978, the terms of the Consulting Agreement, as amended, expired and Runyan's relationship with NCR terminated.

On May 22, 1980, Runyan filed suit in the United States District Court for the Southern District of Ohio alleging that his termination was due to his age in violation of the provisions in the ADEA.

NCR filed a motion for summary judgment which was subsequently granted by the Trial Court. The Trial Court held that Runyan's action was barred by the execution of the "Accord and Satisfaction, Release, and Discharge" on November 25, 1977.

Runyan perfected an appeal to the Sixth Circuit Court of Appeals which initially reversed the Trial Court's grant of summary judgment. In a 2-1 decision, the Court of Appeals held that Runyan's ADEA rights could not be waived pursuant to a private and unsupervised release.

NCR filed a petition for rehearing *en banc* which was granted on June 17, 1985. The Sixth Circuit, *en banc*, subsequently affirmed the judgment of the District Court. The *en banc* Court held that "an unsupervised release of a claim in a bona fide *factual* dispute of this type under these circumstances is not invalid." 787 F.2d at 1044.

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actions, cause and causes of action, suits, debts, contracts, controversies, agreements, promises, damages, judgments, awards, executions, claims and demands whatsoever in law or in equity, which against NCR, I, Richard V. Runyan, ever had, now have, or which I hereafter can, shall, or may have for, upon, or by reason of any matter, cause or thing whatsoever from the beginning of the world to the day of the date of these presents, save and except the aforementioned 'Amendment to Consulting Agreement' of November 25, 1977, and the underlying 'Consulting Agreement of June 1, 1977.' I have read this release and understand all of its terms. I execute it voluntarily and with full knowledge of its significance."

REASONS FOR DENYING THE WRIT

I. THE COURT OF APPEALS CORRECTLY INTERPRETED ESTABLISHED PRECEDENT OF THIS COURT IN REACHING THE CONCLUSION THAT ADEA RIGHTS MAY BE WAIVED BY A PRIVATE AND UNSUPERVISED RELEASE.

Respondent agrees with the Petitioner that the fundamental issue raised in this Petition is whether an unsupervised release is a bar to a subsequent suit under the ADEA. Respondent also agrees that Congress, when it enacted the ADEA, expressly incorporated the enforcement provisions of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. §§ 216-217.

However, NCR specifically disagrees with Petitioner's assertion that the Court of Appeals "chose to disregard Supreme Court authority and enunciated a novel rule, that an unsupervised release of a claim in a bona fide *factual* dispute is *not* invalid." (Petition, p. 10.) On the contrary, the Court of Appeals correctly interpreted this Court's earlier FLSA decisions in *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697 (1945) and *D. A. Schulte, Inc. v. Gangi*, 328 U.S. 108 (1946) in recognizing the validity of the release in this particular factual setting.

In these two cases, this Court analyzed the effect of a private, unsupervised release on a subsequent action to recover liquidated damages under the FLSA. In *O'Neil*, the Court noted "there is nothing in the record which shows that the respondent's release was obtained as the result of the settlement of a bona fide dispute between the parties with respect to coverage or amount." 324 U.S. at 703. The Court ultimately concluded that *"in the absence of a bona fide dispute between the parties as*

to liability, respondent's written waiver of his right to liquidated damages under Section 16(b) [does not bar] a subsequent action to recover liquidated damages." *Id.* at 704. (Emphasis added.)

In *O'Neil*, this Court specifically did *not* address the issue of whether an employee could privately waive his right to claims under the FLSA where such a "bona fide" dispute *did* exist:

> Our decision of the issues . . . has not necessitated a determination of what limitation, *if any*, § 16(b) of the Act places on the validity of agreements between an employer and employee to settle claims arising under the Act if the settlement is made as the result of *a bona fide dispute between the two parties, in consideration of a bona fide compromise and settlement*. (Emphasis added.) 324 U.S. at 714.

In *Gangi*, decided subsequent to *O'Neil*, this Court stated that the "primary issue" before it was "whether the Fair Labor Standards Act precludes a bona fide settlement of a bona fide dispute over the *coverage* of the Act on a claim for overtime compensation and liquidated damages where the employees receive the overtime compensation in full." 328 U.S. at 110. (Emphasis added.) The Court concluded that the same policy considerations militating against such waivers in the *O'Neil* fact-pattern were also present in *Gangi*. Hence, the waivers were held not to be a bar to a subsequent action for liquidated damages.[2]

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[2] In *O'Neil* this Court noted that the intent of the FLSA was to "protect" a particular segment of the working population: "The legislative debates indicate that the prime purpose of the legislation was to aid the unprotected, unorganized and lowest paid of the nation's working population; that is, those employees who lacked sufficient bargaining power to secure for themselves a minimum subsistence wage." 324 U.S. at 707, n. 18.

However, the Court in *Gangi*, as in *O'Neil*, specifically did *not* consider ". . . the possibility of compromises in *other situations* which may arise such as the dispute over the number of hours worked or the regular rate of employment." (Emphasis added.) 328 U.S. at 114-15. The Court cited *Strand v. Garden Valley Telephone Co.*, 51 F. Supp. 898 (D. Minn. 1943) as authority for that remaining unresolved issue. As the Court of Appeals noted in *Runyan*, "[i]n *Strand*, the district court distinguished bona fide disputes over legal issues—for which settlement agreements are not valid—from bona fide disputes over factual issues—for which compromises or settiements are valid and binding." 787 F.2d at 1043. *Accord, Rigopoulos v. Kervan*, 47 F. Supp. 576 (S.D.N.Y. 1942); *Weiss v. Testrite Instrument Co.*, 272 A.D. 696, 74 N.Y.S.2d 673 (1947); *Cassese v. Manufacturers Trust Co.*, 182 Misc. 344, 46 N.Y.S.2d 621 (N.Y. City Ct. 1943).

Having correctly analyzed the holdings in *O'Neil* and *Gangi*, the Court of Appeals held that those decisions did not invalidate the release in the present case. As the Court indicated:

> But we are satisfied that the present case concerns an issue that the Supreme Court in *Gangi* specifically left undecided. In this case, a bona fide dispute does exist concerning whether NCR discharged Runyan in violation of the ADEA. The dispute is not over legal issues such as the ADEA's coverage or its applicability. Rather, the parties contest factual issues concerning the motivation and intent behind NCR's decision to discharge Runyan. This case presents the precise issue not resolved in *O'Neil* and *Gangi*. It presents an issue analogous to the factual dispute discussed in *Strand* and the other cases cited earlier, respecting which those Courts would have

found settlements valid and binding. 787 F.2d at 1044.

In sum, neither *O'Neil*, *Gangi* or any subsequent decision of this Court has held that a waiver would violate the policies of the FLSA[3] where there is a bona fide dispute over "factual" issues pertaining to the question of liability. Accordingly, neither *O'Neil* or *Gangi* bar private, unsupervised waivers of an employee's rights under the ADEA where there exists a bona fide dispute as to an employer's liablity under that statute.[4]

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[3] Nor does the Petitioner's reliance on *Barrentine* v. *Arkansas-Best Freight Systems*, 450 U.S. 728 (1981) or *Tony and Susan Alamo Foundation, et al.* v. *Secretary of Labor*, 105 S. Ct. 1953 (1985) support his conclusion that "[t]he most recent Supreme Court decisions appear to hold that *no* private, unsupervised releases of any kind are valid under the FLSA." (Petition, p. 11.) *Barrentine* dealt with the interplay between a grievance arbitration procedure in a collective bargaining agreement and the waiver of FLSA rights. The focal point of *Alamo Foundation* was whether the FLSA applied to workers engaged in the activities of that religious foundation. Neither case was specifically confronted with a *Strand*-type fact pattern or the bona fide settlement of a private claim under the FLSA. Moreover, as the Court of Appeals noted, "they both concerned the waiver of *legal coverage* under the FLSA." 787 F.2d at 1043, n. 6.

[4] The decision in *United States* v. *Allegheny-Ludlum Industries, Inc.*, 517 F.2d 826 (5th Cir. 1975), *cert. denied*, 425 U.S. 944 (1976), supports the Sixth Circuit's interpretation of *O'Neil* and *Gangi*. The Fifth Circuit has also held that these two decisions do not prohibit employees from "accept[ing] compromise payments and waiv[ing] their claims for further relief in situations where the fact of liability or the amount thereof is disputed." 517 F.2d at 860. The absence of clear administrative or judicial interpretation of the specific issue left open by *O'Neil* and *Gangi*, raised in the case *sub judice*, distinguishes Petitioner's reliance on the presumption in *Lorillard* v. *Pons*, 434 U.S. 575 (1978).

II. THE COURT OF APPEALS' DECISION IS NOT INCONSISTENT WITH *ALEXANDER V. GARDNER-DENVER CO.*, 415 U.S. 36 (1974).

The second issue raised in the Petition is that Runyan's release is too general because it "does not expressly cover claims of age bias" and therefore it fails to satisfy the "specificity" test of *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). (Petition, p. 19.) The Petitioner has also asserted, without citation, that the Court of Appeals has somehow generated a "conflict among the circuits concerning the degree of specificity needed in a release of statutory rights." (Petition, p. 22.) Neither statement is correct.

In *Alexander*, this Court recognized that employers and employees may settle disputes under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.*, as long as the waiver of rights and release of potential liability is voluntary and knowing. 415 U.S. at 52, n. 15. Under Title VII, waivers are deemed to be knowing and voluntary if they clearly provide actual notice of the nature of the rights that are waived and are freely negotiated without fraud or duress. *See, e.g. Pilon v. University of Minnesota*, 710 F.2d 466 (8th Cir. 1983); *Strozier v. General Motors Corp.*, 635 F.2d 424 (5th Cir. 1981).

Consistent with the above, the Court of Appeals held that "[i]n determining whether [Runyan] knowingly and voluntarily waived his ADEA claims, we apply ordinary contract principles." 787 F.2d at 1044, n. 10. In following the "knowing and voluntary" test for ADEA waivers, the Court noted that the Equal Employment Opportunity Commission ("EEOC") had recently adopted proposed rules providing for unsupervised

waivers and releases of private rights under the ADEA.[5] As the Court below stated:

> The agency's expressed basis for this proposal is its preference to encourage voluntary resolution of disputes under the ADEA. We share these express views of the agency charged with responsibility of enforcement of the ADEA. 787 F.2d at 1045.[6]

Furthermore, the Court of Appeals' interpretation of the *O'Neil* and *Gangi* decisions is also entirely consistent with one of the legislative objectives underlying the ADEA—the encouragement of timely and voluntary resolution of disputes.[7] Requiring an older worker to file formal charges with the EEOC in order to secure a potential settlement merely frustrates that Congressional policy.

The principle flowing from footnote 15 of the *Alex-*

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[5] 50 Fed. Reg. 40870 (1985).

[6] This Court itself has noted that Title VII and the ADEA share a common purpose and that similar provisions should be similarly interpreted. *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 756 (1979). Hence, it is entirely consistent to apply the "knowing and voluntary" test for waivers of statutory rights under *both* Title VII and the ADEA.

[7] Commenting on the Administration's initial proposal for utilizing an "agency type" enforcement mechanism in the ADEA, the late Senator Jacob Javits indicated the following:

> . . . one result of the Administration's approach will surely be the same delays which plague so many of our agencies, such as the EEOC and the NLRB. The EEOC, for example, is already years behind in disposing of its docket. *Such delay is always unfortunate, but it is particularly so in the case of older citizens to whom, by definition, relatively few productive years are left. By utilizing the courts rather than a bureaucracy within the Labor Department as the forum to hear cases arising under the law, these delays may be largely avoided.* (Emphasis added).

113 Cong. Rec. at 7076 (1967).

ander decision, only partially cited in the Petition, is that waivers and releases under Title VII must, in fact, be "knowing and voluntary."[8] The specificity of the release itself is merely one factor considered by a reviewing court called upon to apply that particular test. Whether or not the "ADEA" is actually spelled out in the release itself is not dispositive. The totality of the circumstances surrounding the execution of the release and ordinary contract principles will ultimately determine whether or not it was, in fact, "knowing and voluntary."

In the present case, the facts unequivocally established that Runyan, an experienced labor lawyer, had discussed his age discrimination claim and was fully aware of the employment related claims he was relinquishing when he executed the release in exchange for a $12,000.00 increase in his compensation under the Consulting Agreement. Thus, the totality of the circumstances demonstrate a knowing and voluntary release.

Moreover, not only was Runyan fully aware of the intent of the release, but "evidence in the record suggests Runyan tried to take *advantage* of NCR by taking the full benefit of a reasonable and understood bargain, while attempting to part with what he thought might be only illusory consideration in return." 787 F.2d at 1044. (Emphasis added.)

The decision below is fully consistent with this Court's

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[8] The second sentence in footnote 15 qualifies the language cited by the Petitioner and establishes the *fundamental* inquiry in any judicial analysis of waivers under Title VII: "In determining the effectiveness of *any such waiver*, a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing." 415 U.S. at 52, n. 15 (emphasis added).

earlier pronouncement in *Alexander*, a long-line of established precedent upholding the validity of similar releases in the context of Title VII, and the EEOC's own proposed regulations.[9] There is no conflict in the Circuits, as a result of the *Runyan* decision, but rather an awareness that standards governing Title VII waivers are equally applicable to waivers under the ADEA. The Court of Appeals' decision simply recognizes that a similar policy underlies *both* Title VII and the ADEA—the encouragement of voluntary and expeditious resolution of disputes.

III. THIS CASE DOES NOT INVOLVE AN IMPORTANT QUESTION OF FEDERAL LAW.

Petitioner's final argument contends that "the validity of releases of ADEA rights is an important question of federal law which needs to be clarified by this Court." (Petition, p. 20) The issues raised by Runyan do not require the exercise of this Court's extraordinary and discretionary jurisdiction.

The Court of Appeals correctly interpreted existing precedent under the FLSA in upholding the validity of an unsupervised release of a claim in a bona fide *factual* dispute such as that established in the record. The decision has not created a "new" or "totally unworkable" rule in conflict with this Court's earlier holdings in the *O'Neil* and *Gangi* decisions. The Court of Appeals inter-

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[9] The Court of Appeals in *Runyan*, recognizing the different segments of the workforce to be protected by the FLSA on the one hand and the ADEA on the other, also emphasized that "a practice, even if not officially sanctioned, has developed that permits effectuating and recognizing settlements of ADEA disputes that employees and employers have worked out in good faith without agency involvement." 787 F.2d at 1043.

preted those early FLSA decisions in view of the stated legislative policy underlyng the ADEA of encouraging timely and voluntary resolution of disputes.

Contrary to Petitioner's assertion, the *Runyan* decision is also not one which will fail to "protect older workers from employer overreaching." (Petition, p. 21).[10] The Court of Appeals has established a "fact-specific" inquiry to be utilized by a reviewing Court whenever a release has been subject to attack. Applying ordinary contract principles on a "case-by-case" basis to determine the validity of a particular release is far more equitable than a *per se* invalidation of *all* unsupervised releases—including those that are clearly "knowing and voluntary." As noted earlier, the Court of Appeals' decision simply places a judicial stamp of approval on the common practice that "has developed that permits effectuating and recognizing settlements of ADEA disputes that employees and employers have worked out in good faith without agency involvement." 787 F.2d at 1043.

The opinion of the Court of Appeals is not only well-grounded in the law but also based on uncontroverted facts which establish the "knowing and voluntary" nature of Runyan's release.

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[10] The Court of Appeals was well aware of the potential problem of "overreaching" and specifically addressed it in the opinion:

> We recognize, however, that in accord with concerns expressed in *O'Neil* and *Gangi* courts should not allow employers to compromise the underlying policies of the ADEA by taking advantage of a superior bargaining position or by overreaching.
>
> * * *
>
> In determining whether an ADEA settlement and release is valid, a court should apply the principles expressed by Justice Frankfurter that encourage "amicable settlement of honest differences . . . where overreaching or exploitation is not inherent in the situation." 787 F.2d at 1044-45.

In sum, the issues raised in the Courts below have been fully and correctly addressed and are not of such a magnitude as to warrant the exercise of this Court's discretionary jurisdiction.

CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

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